PRIVY COUNCIL.

P. C.* 1886 *March* 19, 23, 24, 25 *and* 26. *April* 9.

JAGADAMBA CHAODHRANI AND ANOTHER (PLAINTIFFS) *v.* DAKHINA MOHUN ROY CHAODHRI AND OTHERS (DEFENDANTS).

SARODA MOHUN ROY CHAODHRI (PLAINTIFF) *v.* DAKHINA MOHUN ROY CHAODHRI AND OTHERS (DEFENDANTS).

[On appeal from the High Court at Calcutta.]

Limitation Act (*IX of* 1871), *Sch. II, Art.* 129—*Meaning of "suit to set aside adoption."*

Art. 129 of Sch. II of Act IX of 1871, the Indian Limitation Act of that year, using the expression "suit to set aside an adoption," denoted a suit bringing the validity of an adoption into question; and the rule of limitation, given by that Article, applied to all suits in which the suitor could not succeed without displacing an apparent adoption, in virtue of which the opposite party was in possession.

The plaintiffs, as collateral heirs of a childless Hindu, questioned adoptions purporting to have been made by his widows in pursuance of authority from him; such adoptions having been followed by continuous possession, and having been recognized in formal instruments, proceedings, and decrees to which the plaintiffs were parties. *Held*, on the ground that the adoptions were brought into question more than twelve years after their date, though less than twelve years after the plaintiffs' titles (if any) had accrued at the death of the surviving widow, that the suits were barred under Art. 129 of Sch. II of Act IX of 1871.

Part of the language of the judgment in *Raja Bahadur Singh* v. *Achumbit Lall* (1) referred to, and that case, in which the plaintiffs' claim was not affected by the widow's adoption, distinguished from the present.

CONSOLIDATED appeals from two decrees (25th March 1882) of the High Court, reversing two decrees (5th October 1877) of the Subordinate Judge of Rangpur.

The suits giving rise to these appeals, brought by collateral relations by adoption, alleging title to the possession of the estate of a childless Hindu on his decease, questioned the validity of adoptions made by the widows of the deceased. Limitation under Art. 129 of Schedule II of Act IX of 1871, the Indian Limitation Act then in force (2), was the ground, amongst

* *Present*: LORD BLACKBURN, LORD HOBHOUSE, and SIR R. COUCH.

(1) L. R., 6 Ind. Ap., 110.

(2) That Art. 129 enacted the following rule of limitation: "To establish or set aside an adoption—twelve years from the date of the

other grounds, including Art. 143 of the Second Schedule of the same Act, of the dismissal of the suits in the Court of first instance. In regard to such other grounds, without special reference to Art. 129, which related to adoptions, but viewing the effect of Art. 143, which related to suits generally, for the possession of immoveables, differently from the first Court, the High Court reversed the decisions of the lower Court, and decreed the claims. The application, however, of Art. 129 was again raised as a principal question on the present proceedings, and that Article having been held to apply, no other question for decision remained.

Three brothers, sons of Anand Mohun Chaodhri, *viz.*, Kali Mohun Chaodhri, who died in 1856, Tarini Mohun, who died in 1833, and Hurro Mohun, who died in 1846, being without sons, all of them either adopted or gave to their widows authority to adopt.

Dakhina Mohun, the adopted son of the first of the above, and Tara Mohun, the adopted son of the second, separately brought the suits out of which the present appeals arose, each claiming to be an heir of Hurro Mohun, brother of their respective adoptive fathers.

The object of both suits was the same—to oust, as having no title to Hurro Mohun's estate as against his collateral heirs, the defendant Saroda Mohun, and for the same reason, the defendants Jagadamba, the widow, and Jotindro Mohun, the minor son of Durga Mohun, deceased, alleging that the adoptions, under which the latter and Saroda Mohun had got possession of Hurro Mohun's estate between them, were unauthorized and invalid.

For the defence it was set up that the adoption of Saroda Mohun

adoption, or at the option of the plaintiff the date of the death of the adoptive father."

Art. 143 enacted: "For possession of immoveable property when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession—twelve years from the date of the dispossession or discontinuance."

Art. 118 of the Second Schedule of Act XV of 1877: "To obtain a declaration that an alleged adoption is invalid, or never, in fact, took place—twelve years from the time when the alleged adoption becomes known to the plaintiff."

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had been validly made in 1853 by the elder widow Radha Sundari, who died in 1868, and that the younger widow, Hurripria, who died in 1864, had duly adopted Durga Mohun in 1856. The sons so adopted had agreed on coming of age to raise no question as to which was the valid adoption; and held on the footing that, whichever of the two was entitled allowed the other to possess half the estate. They also relied upon limitation under Act IX of 1871, Art. 129 and 143 of Schedule II. The first suit was brought by Tara Mohun since deceased, and now represented by Annoda Mohun his son in April 1873, for one half of Hurro Mohun's estate, allowing that Dakhina Mohun was entitled to the other. The second suit was brought more than a year later by Dakhina Mohun for the entire estate. He, however, afterwards admitted, while the appeals were pending in the High Court, what had been done in regard to the adoption of Tara Mohun.

The Subordinate Judge of Rangpur, Baboo Bhagwan Chandro Chakerbatti, dismissed both suits as barred under Art. 129. He was also of opinion that both suits were barred under Art. 143. He further found that the adoptions, impugned by the plaintiffs, were good and valid. In regard to Art. 129, he was of opinion that the suits were in effect to set aside adoptions, as by that means alone could the defendants' titles be defeated; and he referred to *Siddhessur Dutt* v. *Sham Chand Nundun* (1) as showing that the alternative period, *viz.*, the date of the death of the adoptive father, from which a plaintiff might count the twelve years' bar, could not be construed to mean the date of the adoptive mother's death. In regard to s. 143, he found that no one through whom the plaintiffs claimed, had been in possession within the twelve years preceding the claim. The widows' possession had been discontinued; and it was on behalf of the defendants, during their minority, that possession had been held. Hurro Mohun dying in 1253, left an instrument termed *adhyakhyanama*, or document as to the holding possession of the property, whereby he appointed trustees to be *adhyakhyara*, or holders of the property in trust for each son as might be adopted to him, under the *anumatipatro* to the

(1) 15 B. L. R., 9 : 23 W. R., 285.

widows, which he executed on the same date. The effect of this was, in the Subordinate Judge's opinion, practically to disinherit the widows. The above trustees were in possession for about a year, and then, in consequence of disputes with the widows, they relinquished the trust, the widows' names being entered in the Collectorate records. The latter state of things continued for about five years. In 1259 (1852), from which date the possession on behalf of any one claiming through the widows' late husband must have ceased, a manager, appointed on behalf of an adopted son (other than the present defendants, and since deceased,) was placed in possession of the property now in dispute. Thus there was, in fact, a possession adverse to the present plaintiffs. For these reasons he dismissed their claims.

The plaintiffs severally appealed to the High Court, and a Divisional Bench (MORRIS and PRINSEP, JJ.) reversed the above decision, for reasons given as follows :

" As regards the plea that the suits are barred by limitation, we would merely remark that the general rule in all cases of this description, brought by a reversionary heir to recover possession of family property from one who sets up a title on adoption by a Hindu widow, is, that limitation is calculated from the time when the title of the reversionary heir accrues on the death of the Hindu widow. That was admitted to be settled law in the case, before the Privy Council, of *Rajendro Lall Holdar* v. *Jogendro Nath Bonnerjee* (1), and the law has since remained unaltered.

" It has, however, been contended before us, as in the lower Court, that the widows never had possession on their own account, but that on the death of Hurro Mohun, and subsequently, his estate has been held on titles adverse to those of the widows, and that, therefore, their titles, as well as those derived by the ordinary right of inheritance from Hurro Mohun, are barred.

" We cannot accept this view of the case. At Hurro Mohun's death, in accordance with the *adhyakhyanama*, the names of the managers or trustees appointed by him were duly recorded in the Collector's register with those of the widows. The power

(1) 14 Moore's I. A., 67 : 7 B. L. R., 216.

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of the widows was, no doubt, limited by that deed; but there was nothing in the deed itself which did or could disinherit the widows or confer on any one a title adverse to them. There was conferred on them the power to adopt, and the 'managers' were directed to hold on behalf of sons to be adopted; but that did not the less vest the estate in the widows until they had adopted. If they never exercised the power of adoption, [and we may observe that they could not be compelled to adopt—*Pearee Dayee* v. *Hurbunsee Kooer* (1); *Bamun Das Mookerjee* v. *Mussummat Tarini* (2)], the managers would be relieved of their duty unless they were acting for the widows. The Subordinate Judge is wrong in stating that the widows were disinherited. That could not be, except in favor of some living being. They could not be disinherited in favor of some one whom they might never call into existence. The fact, too, that the widows were registered with the managers as proprietors of the estates, shows that they were regarded, not only as joint proprietors, but as in joint possession. Next, if we look to the evidence, we find that very shortly afterwards, the widows succeeded in getting rid of the managers, and were recorded not only as sole proprietors, but in sole possession on their own account; and this is remarkable, because at that time they had exercised the power to adopt and had begun to dispute with one another regarding their relative rights in this respect. Under such circumstances, we cannot agree with the lower Court that the suits are barred by limitation, inasmuch as they have been brought within twelve years from the death of Radha Sundari, the elder widow, who survived Hurripria, the younger."

As to the validity of the adoptions in question, the High Court held that, though a power to adopt had been given, and adoptions had been made, or purported to have been made under it, the power had not been exercised in the manner directed in it, and that the adoptions were, therefore, bad.

The respondents Dakhina Mohun and Annoda Mohun accordingly obtained decrees against Saroda Mohun, and the son and widow of Durga Mohun, for possession of the estate.

(1) 19 W. R., 127. (2) 7 Moore's I. A., 190.

On the appeals of the defendants, which separately filed in the two suits were four in number, and were consolidated by an order in Council (15th November 1884), Mr. *R. V. Doyne*, and Mr. *J. D. Mayne*, for the appellants, contended that the High Court had disregarded the law of limitation. Art. 129 of Sch. II. of Act IX of 1871 was applicable to the suits, which were in substance "to set aside adoptions" within its meaning. If recognized—and as to this the appellants had a good case on the merits—the adoptions could not fail to carry the title to the estate with them; and therefore these suits, though suits for possession, were in effect suits to set them aside. However inaccurate the expression might be, it was always used to signify not only a question of the validity of an adoption, but a dispute as to its having taken place. In connection with this, reference was made to *Bhyrub Chunder Chowdhree* v. *Kalee Kishwar Raee* (1); *Govind Kishore Roy* v. *Radha Madhab Adheekaree* (2); *Sooburnomonee Dabea* v. *Petumber Dobey* (3); *Radha Kissoree Dossee* v. *Gutheekissen Sircar* (4); *Radhakissen Mahapater* v. *Sreekissen Mahapater* (5); *Jogendro Nath Banerjee* v. *Rajendernath Holdar* (6); *Srinath Gangopadhya* v. *Moheschandra Roy* (7); *Mrinmoyee Dabea* v. *Bhoobunmoyee Dabea* (8); *Siddhessur Dutt* v. *Sham Chand Nundun* (9); *Raj Bahadur Singh* v. *Achumbit Lal* (10); *Gopalayyan* v. *Raghupatiayyan* (11) *Sadashiv Moreshvar Ghate* v. *Hari Moreshvar Ghate* (12).

As regards Art. 143, and the question of possession, the evidence showed that, after Hurro Mohun's death, the estate vested in the managers, and that there had been a possession adverse to those through whom the plaintiffs claimed for more than twelve years before these suits were brought. There was a possession adverse to the widows, who represented their husband's estate; and it was adverse to them whether the adoptions were valid or invalid. If valid, the adopted sons were in possession

(1) S. D. A., 1850, p. 369.
(2) S. D. A., 1856, p. 450.
(3) Marsh., 221.
(4) W. R., 1864, p. 272.
(5) 1 W. R., 62.
(6) 7 W. R., 357, and on appeal 14 Moore's I. A., 67.
(7) 4 B. L. R., F. B., 3.
(8) 15 B. L. R., 1.
(9) 15 B. L. R., 9: 23 W. R., 285.
(10) L. R., 6 I. A., 110.
(11) 7 Mad. H. C., 250.
(12) 11 Bom. H. C., 190.

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as of right; if invalid, their possession, being under supposed right, was none the less adverse to the widows representing the family inheritance. Moreover, in consequence of the adoptions, and what followed them, both the widows themselves were barred under Art. 143: representing, then, as they did, the whole estate, there was nothing left for the present claimants to inherit. A valid adoption, if made, swept away the estate in remainder; if invalid, the adverse possession was equally subsisting, and upon it limitation operated to bar the claims of others. If a widow exercised an authority to adopt, given to her by her husband, so long as the adoption made by her was recognized, there was a possession adverse to other claimants, the possession being on behalf of the adopted son. A suit whether by her, or by the heirs in remainder, if they chose to claim, the widow representing the entire estate for these purposes, must be brought within twelve years from the commencement of the adverse possession. This had been decided in India, and approved by this Committee. Reference was made to *Nobinchunder Chuckerbutty* v. *Issur Chunder Chuckerbutty* (1); *Amirtolal Bose* v. *Rajonikant Mitter* (2); *Srinath Kur* v. *Prosunno Kumar Ghose* (3); *Saroda Sundury Dossee* v. *Doyamoyee Dossee* (4).

It was also argued that, inasmuch as under the law of Regulation III of 1793, a title by non-claim accrued to the possessor, after twelve years' adverse possession, so also under the subsequent enactments not only was a suit against him barred, but his title was good against all other titles—*Doe d. Sib Chunder Doss* v. *Sib Kissen Bonnerjee* (5). This remained unaltered under the law of Act XIV of 1859, s. 1, cl. 12. Nor was it altered by the subsequent enactment of Act IX of 1871, at a time when the adopted sons had in this case acquired titles. The latter was a remedial Act, not intended to affect, or interfere with, titles already acquired by prescription at the time when it came into operation. In regard to the operation of Act IX of

(1) B. L. R., Sup. Vol. 1008: 9 W. R., 505.
(2) 15 B. L. R., 10; 23 W. R., 214; L. R., 2 I. A., 113.
(3) I. L. R., 9 Calc., 934.
(4) I. L. R., 5 Calc., 938.
(5) 1 Boulnois, 70.

1871 upon titles subsisting previously to its enactment, see *Rajrup Koer* v. *Abul Hossein* (1).

Mr. *T. H. Cowie, Q.C.*, and Mr. *H. Cowell*, for the respondents, argued that the suits were not barred, either by the law of Art. 129, or Art. 143. As regards Art. 129 the suits were neither in form, nor in substance, to set aside adoptions. The cause of action in these claims for possession did not accrue till the death of the surviving widow; and, though a suit for a declaratory decree, which it was discretionary with the Court to entertain or not, might have been open to the respondents within the period prescribed by s. 129, and would now be barred, the direct object of the present suits was not to set aside the adoptions. Their direct object was to set forth a title showing a right to the immediate possession of Hurro Mohun's estate. If the defence set up adoptions it would be incident to the case that the question of the adoptions should be tried; but this question was one which the defence brought up. To allow that the adoptions were, or might be, effective as family acts, insufficient, however, to defeat the rights of the respondents, was entirely consistent with the claims made by the latter. Limitation under Art. 129 must, if it applied at all, be applied to the commencement of the suit; and in the claim made by the plaint, irrespectively of what was put forward for the defence, the right to the proprietary possession was all that was set forth; it being all that was necessary to the plaintiffs' case. There were in effect two tests that could be applied, in order to ascertain whether a suit was, or was not, a suit within Art. 129. The first was, what was the nature of the decree asked for, or made? In this case it was a decree for possession of the property claimed, without reference to the subject of adoption. The second test was, who would be entitled to succeed if no evidence was taken. Now, in this case, the title of the respondents, *primâ facie* good, was attempted to be met by the alleged adoptions, which had to be established by the appellants. Reference was made to *Srinath Gangopadhya* v. *Moheschandra Roy* (2); *Gopal Chunder*

(1) I. L. R., 6 Calc., 394; L. R., 7 I. A., 240.
(2) 4 B. L. R., F. B., 3.

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Mitter v. *Mohes Chunder Boral* (1); *Jogendra Nath Banerjee* v. *Rajender Nath Holdar* (2).

It was further contended that the observations in the judgment in *Raj Bahadoor Singh* v. *Achambit Lal* (3), were clearly in point and binding.

In reference to the argument for the appellants upon Art. 143 of the Second Schedule, upon the evidence, no adverse possession for twelve years had been shown; and this became clear when the position of the manager, appointed by the Court, was considered. His possession was not on behalf of the sons alleged to have been adopted; but was on behalf of the person, or persons, legally entitled, to whom, according to the judgment of this Committee in *Rao Karan Singh* v. *Raja Bakar Ali Khan* (4), such a possession could not be adverse.

Mr. *R. V. Doyne* replied.

On a subsequent day, April 9th, their Lordships' judgment was delivered by

LORD HOBHOUSE.—Their Lordships have upon consideration found themselves able to dispose of these appeals upon one of the questions which were argued at the Bar very fully, and with great learning and ability with reference to the law of limitation. And though the cases, which embrace many complicated issues, are very voluminous, the facts material for this decision are few and simple.

Hurro Mohun died childless in April 1846, leaving two widows. That he had given them permission to adopt sons is clear; but in what order of priority the permission was given is one of the many points in dispute. What happened was that each of the widows adopted a son who died, and afterwards each of them adopted another. Of course both adoptions could not be valid though both might be invalid, as the plaintiffs contend they were. But during the minority of the adopted sons both were treated as adopted, and after they they attained age they agreed to raise no question as between themselves, but to enjoy Hurro Mohun's pro-

(1) I. L. R., 9 Calc., 320.
(2) 7 W. R., 357, and on appeal 14 Moore's I. A., 67.
(3) L. R., 6 I. A., 110.
(4) I. L. R., 5 All., 1 : L. R., 9 I. A., 99.

perty in equal shares. If therefore either of the adoptions was valid, both of the adopted sons were safe in their possession.

The plaintiffs in the suits are the persons who, failing adoption, were the heirs of Hurro Mohun at the death of his surviving widow. One suit was instituted by one heir in April 1873, the other by the other heir in August 1874. The defendant Saroda was adopted in December 1853; the defendant Jagadamba is the widow of Durga, who was adopted in August 1856. The surviving widow, Radha Sundari by name, died in July 1868. It thus appears that the earliest suit was brought 18 years after the latest adoption, and the latest suit a little less than six years after the death of the surviving widow.

The Limitation Act in force when these suits were commenced is Act IX of 1871, and it is on the construction of that Act that the question depends. The suits may possibly be considered as falling under one of three articles. They may be considered as suits to set aside an adoption (Art. 129), or as suits for possession of immoveable property by Hindus entitled to possession on the death of a Hindu widow (Art. 142), or as suits for possession of immoveable property not otherwise specially provided for in the Act (Art. 145).

The Subordinate Judge of Rangpur who heard the suits in the first instance dismissed them with costs. He decided for the defendants, not only on the ground that one of the adoptions was valid, but also on the ground of limitation. His opinion is found in the Record thus expressed, probably with some inaccuracy in the transcription:

"The plaintiffs, although they have only sued for possession of the property as heirs-at-law of their deceased uncle Hurro Mohun Chaodhri, but as a fact apparent in itself they cannot likely succeed unless and until the adoptions of Saroda Mohun and Durga Mohun be set aside, making the way plain and smooth for the plaintiffs to enter into possession as heirs of Hurro Mohun Chaodhri. The formation of the plaints can render no advantage to the plaintiffs. Whatever terms they might have used in framing the plaints and the consequential relief sought for, they are in effect suits to set aside the adoptions, and should have therefore been brought within the time allowed by law, to be reckoned from the dates of the successive adoptions."

That is a clear statement of reasons for thinking that the suits fall under Art. 129, and are therefore each barred by the lapse

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of 12 years from the date of the adoption which it seeks to set aside.

The High Court reversed the decision of the Subordinate Judge, and gave the plaintiffs the decree they asked for. On the issue of limitation they say :—

"As regards the plea that the suits are barred by limitation, we would merely remark that the general rule in all cases of this description brought by a reversionary heir to recover possession of family property from one who sets up a title on adoption by a Hindu widow is that limitation is calculated from the time when the title of the reversionary heir accrues on the death of the Hindu widow."

They do not appear to have addressed themselves to the question whether or no Art. 129 governs the case.

The plaintiffs' Counsel have contended that the case falls under Art. 142, or if not, that it is not specifically provided for, and so falls within Art. 145, and that in either case time runs against them only from the death of Radha Sundari. The endeavour to apply those Articles raises several difficult questions of fact and law, but it is not necessary to pronounce any opinion on them if Art. 129 applies to the suits and raises a bar which in each suit is 12 years after the adoption.

It is ingeniously argued for the plaintiffs that they are suing not to set aside any adoption, but to recover possession on their *primâ facie* title as heirs, that it is the defendants who have to allege and prove adoption, and that, on their failure to do so, it will not be set aside, but taken as never having existed. But the answer is that the defendants are in possession in the character of adopted sons; the *primâ facie* title is with them, and until that is displaced they ought to retain their possession. It may not make any difference in law, but it does so happen in this case that the plaintiffs have recognized the adoptees as such for many years in formal instruments and proceedings, and even that parts of the property now sued for have been recovered from the plaintiffs in suits instituted on behalf of the adopted sons by the manager of their estate during their minority. Indeed in one of the present suits the plaintiff tells the story of the adoptions, and directly impeaches their validity. In the other the plaint is silent on that point. But whatever the mode of pleading, there is but one issue on the merits of

the case, namely, the validity or invalidity of the adoptions, by virtue of which alone the defendants hold their property. If the validity is proved, the plaintiffs cannot succeed in their claim. Now Art. 129 of the Limitation Act provides that, for a suit to establish or set aside an adoption, the period of limitation shall be either the date of the adoption or the date of the death of the adoptive father. And each of the defendants contends that the true construction of these words is that the validity of his adoption shall not be challenged after 12 years from the later of the two dates assigned as the starting points of time, which in this case is the date of the adoption.

It must be confessed that the words of the Article are not such as to prevent doubt or difficulty in its construction. The expression "suit to set aside an adoption" is not quite precise as applied to any suit. An adoption may be established, but can hardly be set aside, though an alleged or pretended adoption may be declared to be no adoption at all.

Very early in the argument their Lordships asked to be informed what is meant by setting aside an adoption. The only answer is in the language of the reports, from which it would seem that the phrase "suit to set aside an adoption" is a short and familiar way of describing a class of suits well known to practitioners and spoken of in those terms with accuracy enough for all ordinary purposes. In the earliest case cited at the Bar from the S. D. A. Reports for 1850 (1) it was held that the plaintiffs had a cause of action when possession was taken under colour of an adoption. Mr. Justice Colvin says: "The plain remedy for the plaintiff was to sue to set aside the succession by adoption as declared and perfected. The present plaint is a mere attempt to evade the consequences of that neglect, and to bring the adoption to an issue under colour of a statement" of continued possession of the adopting widow. In the case cited from the S. D. A. Reports for 1856 (2) the suit was for possession of the property; but the reporter styles it "suit to set aside adoption." In the case cited from the 4th Bengal Law Reports (3), the reporter calls the suit one to recover possession and

(1) *Bhyrub Chunder Chowdhree* v. *Kulee Kishwar Raee*, S. D. A., 1850, 369.

(2) *Govind Kishore Roy* v. *Radhamadob Adheekaree*, S. D. A., 1856, 459.

(3) *Srinath Gangopadhya* v. *Mohcschandra Roy*, 4 B. L. R., F. B., 3.

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to set aside the adoption. Mr. Justice Kemp calls it a suit to set aside an adoption. Chief Justice Peacock corrects the expression, saying: "Although the suit is said to be a suit to recover possession by setting aside the illegal adoption, the suit is, in fact, a suit by the reversionary heir to recover possession notwithstanding that adoption." In the case cited from 15th Bengal Law Reports (1), where the adopting widow was still living, the suit is called one to set aside an adoption. In his judgment Mr. Justice Jackson refers to the case in the 4th Bengal Law Reports as one in which a Full Bench determined "that the cause of action in a suit for setting aside the adoption accrues after the death of the widow."

It thus appears that the expression "set aside an adoption" is and has been for many years applied in the ordinary language of Indian lawyers to proceedings which bring the validity of an alleged adoption under question, and applied quite indiscriminately to suits for possession of land and to suits of a declaratory nature. It is worth observing that in the Limitation Act of 1877, which superseded the Act now under discussion, the language is changed. Art. 128 of Act XV of 1877, which corresponds to Art. 129 of 1871, so far as regards setting aside adoptions, speaks of a suit "to obtain a declaration that an alleged adoption is invalid or never in fact took place," and assigns a different starting point to the time that is to run against it. Whether the alteration of language denotes a change of policy, or how much change of law it affects, are questions not now before their Lordships. Nor do they think that any guidance in the construction of the earlier Act is to be gained from the later one, except that we may fairly infer that the Legislature considered the expression "suit to set aside an adoption" to be one of a loose kind, and that more precision was desirable.

If then the expression is not such as to denote solely, or even to denote accurately, a suit confined to a declaration that an alleged adoption is invalid in law or never took place in fact, is there anything in the scope or structure of the Act to prevent us from giving to it the ordinary sense in which it is used, though it may be loosely, by professional men? The plaintiffs' Counsel

(1) *Mrinmoyee Dabea* v. *Bhoobunmoyee Dabea*, 15 B. L. R., 1.

were asked, but were not able, to suggest any principle on which suits involving the issue of adoption or no adoption must, if of a merely declaratory nature, be brought within 12 years from the adoption, while yet the very same issue is left open for 12 years after the death of the adopting widow, it may be 50 years more, if only it is mixed up with a suit for the possession of the same property. It seems to their Lordships that the more rational and probable principle to ascribe to an Act whose language admits of it, is the principle of allowing only a moderate time within which such delicate and intricate questions as those involved in adoptions shall be brought into dispute, so that it shall strike alike at all suits in which the plaintiff cannot possibly succeed without displacing an apparent adoption by virtue of which the defendant is in possession.

Considerable stress has been laid upon a passage in the judgment which this Board delivered in the case of *Raj Bahadur Singh* v. *Achumbit Lal* (1) and which is said to be decisive of the present point. The passage is as follows :—

"Their Lordships are clearly of opinion that this provision relating to adoption, though it might bar a suit brought only for the purpose of setting aside the adoption, does not interfere with the right which, but for it, a plaintiff has of bringing a suit to recover possession of real property within twelve years from the time when the right accrued, and that they regard as the nature of this suit."

Detached from its context and from the facts of the case, that would seem to be a strong authority in favour of the plaintiffs in the present case. But when read with what goes before, it has no such effect. The suit in question was brought by the heir of Doorga Pershad to recover possession of his estate after his widow's death. The real contest was whether he had given an absolute interest to his widow which she could transmit to the defendant. But she had executed an instrument called a deed of adoption, which their Lordships describe thus: "This document cannot be seriously treated as an attempt on the part of the widow to adopt a son or sons as heirs to her husband, but of merely an adoption of heirs to herself, and in fact a disposition of her property, very much in the nature of a will, to them after her

(1) L. R., 6 I. A., 110.

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death. . . . On the above view of the document the words of the Statute would seem scarcely applicable to it." And then follows the passage above quoted. It is clear, therefore, that in that case the plaintiff was not embarrassed by the widow's adoption of the defendant. He could recover the estate of Doorga Pershad without in any way disturbing the adoption. And to apply the remarks there made, in somewhat general terms, to a case in which the heir cannot possibly get at the ancestor's property without disturbance of a title and of possession founded on adoption to that ancestor, is to put upon them a meaning they were never intended to bear.

The result is that for the foregoing reasons their Lordships agree with the opinion expressed by the Subordinate Judge on this point. They think that the High Court should have dismissed with costs the appeal from that Judge's decree, and they will now humbly advise Her Majesty to make a decree to that effect.

The respondents, who are in the interest of the original plaintiffs, must pay the costs of these appeals.

Appeals allowed with costs.

Solicitors for the appellants: Messrs. *Barrow & Rogers.*

Solicitors for the respondents: Messrs. *Watkins & Lattey.*

C. B.

CIVIL REFERENCE.

Before Mr. Justice Miller and Mr. Justice Grant.

1886. *July* 16.

OO NOUNG AND ANOTHER (PLAINTIFFS) *v.* MOUNG HTOON OO AND OTHERS (DEFENDANTS).[a]

Equitable Mortgage—Deposit of title deeds—Contract of Mortgage—Letter stating terms of Equitable Mortgage, Effect of—Equitable Mortgagee, his proper remedy.

A and *B* executed a joint and several promissory note in favour of the plaintiff. On the same day *A* deposited with the plaintiff the title deeds of his property as collateral security, and received conjointly with *B* a part of the consideration money for the promissory note. Shortly afterwards *A*

[a] Civil Reference No. 8 of 1886, made by C. E. Fox, Esq., Officiating Additional Recorder of Rangoon, dated the 11th of May 1886.